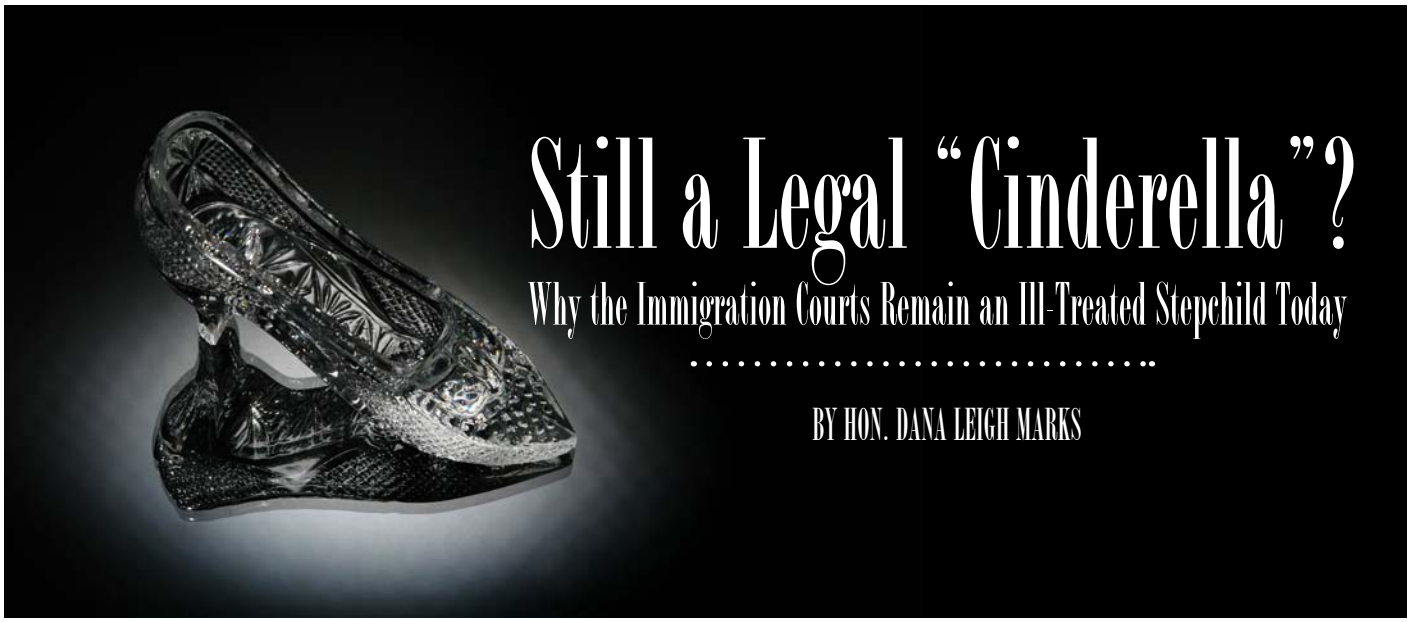

Still a Legal "Cinderella"?

Why the Immigration Courts Remain an Ill-Treated Stepchild Today

BY HON. DANA LEIGH MARKS

You say to yourself, "Immigration courts, they don't affect me so why should I bother to read that article?" Read on, I say, and you will quickly learn that regardless of the focus of your legal practice, there is much to be learned and most of it quite interesting. This article will put the importance of the work of the immigration courts into perspective, and give you a peek into the larger legal issues and ramifications of the workings of this often misunderstood tribunal. You will see how these developments are quickly making a basic understanding of the structure of immigration law a "must-know" for all competent lawyers.

I have been practicing in this legal specialty for so many years that I never took a class in immigration law while I was in law school—the class wasn't offered every year and I didn't discover the field until it was too late for me. My first paying job as a law student was in this little-known area, which, at the time, was widely stereotyped by attorneys as being the turf of shady, second-rate lawyers, whom many considered to be mere predators who took advantage of uneducated foreigners. Being too young to know any better, or to care much about that perception, I jumped in with both feet. Some 35 years later, I have a victory before the Supreme Court under my belt, almost 25 years on the bench as an immigration judge, and more than two decades of experience teaching law students, lawyers, and judges. Today, I and the organization I lead, the National Association of Immigration Judges (NAIJ), fight daily to combat the remnants of the misperceptions I encountered early in my career, as we work to achieve enduring structural reform to the system that will benefit the public we serve.

During my legal career, immigration law has transformed from an arcane, maligned, and ofttimes extraneous-seeming legal specialty into an area of law that routinely crops up in the everyday work of tens of thousands of attorneys who practice in the areas of criminal, family, juvenile, and civil law. You may be among these multitudes and not even realize you are. The goal of this article is to provide insight into this still-misunderstood field and to demonstrate why it is in the interest of the legal community and the public to work for reform of immigration courts.

Who We Are

The NAIJ is the certified representative and recognized collective bargaining unit of the approximately 260 immigration judges who preside in 59 courts throughout the Unites States and U.S. territories.[1] The NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of the AFL-CIO.

Immigration judges are a diverse group of highly skilled attorneys, whose backgrounds include representation in administrative and federal courts. Some immigration judges are former prosecutors for the U.S. Department of Homeland Security (DHS), others are former private practitioners. Our ranks include former state court judges, former U.S. attorneys, and the former national president of the American Immigration Lawyers Association, the field's most prestigious legal organization. Several others were local chapter officers of that organization. Many immigration judges continue to serve as adjunct law professors at well-respected law schools throughout the United States.

What We Do

Immigration courts are the trial-level tribunals that determine whether or not an individual is a citizen of the United States, whether or not that person is here in violation of our immigration laws, and, if so, whether or not that immigrant qualifies for some kind of immigration status that would allow the person to remain here legally.

The proceedings over which we preside rival the complexity of proceedings involving tax law and have consequences that can implicate all that makes life worth living, or even threaten life itself.[2] At first blush, any observer can appreciate the high stakes of a case involving political asylum, but there are many more examples of the life-altering consequences of our proceedings. The people who appear before immigration courts include lawful permanent residents who have lived virtually their entire lives in the United States, vulnerable unaccompanied minors, unrepresented adults who are mentally incompetent, and sometimes individuals who are actually U.S. citizens, though they might not realize that they derived such status through operation of law or may have difficulty mustering the necessary evidence to prove the factual basis of their claim.

Credibility determinations are frequently based on the testimony of only one witness: the applicant. The immigration judge must evaluate that testimony through the proper lens selected from a myriad of diverse political, cultural, and linguistic contexts. During FY2010, for example, only 17 percent of immigration court proceedings were conducted in English; 282 different languages were used for the balance.[3] Circuit courts, moreover, are asking for an increasingly intricate credibility analysis by mandating that an applicant be provided an opportunity to explain each and every inconsistency that is noted. As such, rendering credibility determinations is often a painstaking and confusing process and frequently requires meticulous citation to voluminous country conditions sources, when they exist in the record, in order to provide context for plausibility assessments.

Political scientists, academic scholars, and psychologists are being presented as expert witnesses in increasing numbers in these proceedings, and the immigration judge must synthesize, analyze, and appropriately weigh the complicated testimony they offer. Many times asylum cases sound more like university lectures on the political realities of some little-known dictatorship or a psychology class on the etiology of domestic violence and post-traumatic stress, rather than resembling typical courtroom exchanges.

Moreover, because these are civil proceedings, the respondents in our courts have no right to government-appointed counsel, and the availability of pro bono legal services is extremely limited. Overall, only 40 percent of respondents in immigration proceedings are represented by counsel, and that figure drops to approximately 15 percent when the respondents are individuals who have been detained.[4]

Most legal observers are stunned to see the spartan conditions under which immigration judges hold hearings. We have no court reporters or bailiffs in nondetained settings and, in addition to our judicial duties, we are responsible for operating the recording equipment that creates the official administrative record of the proceedings. Even though digital audio recording has finally been implemented nationwide, it is not without its own problems and is no panacea for the many shortcomings that have long plagued our transcripts, particularly when coupled with the use of video teleconference equipment for hearings, which is used more frequently these days.

At the conclusion of hours of painstaking direct and cross-examination, immigration judges render an extemporaneous oral decision, often lasting 45 minutes or more. These decisions are generally handed down without the benefit of a judicial law clerk's research or drafting assistance because the ratio of judges to law clerks remains inadequate for the task. Today, because three judges routinely share one clerk, most immigration judges have access to only a third of a judicial law clerk's time.[5] Immigration judges cannot refer to a transcript when making their decisions, because written transcripts of the proceedings are created only after a decision is appealed. Immigration judges must rely not only on their notes to remember the testimonial evidence presented by the parties but also on their knowledge of the law, because prehearing briefs are the exception, not the norm. Each week, immigration judges generally spend 36 hours in court and on the bench, leaving them little time to devote to adjudicating motions, preparing cases, or staying abreast of legal precedent in this highly fluid area of the law.

Unlike most administrative judges' power, that of immigration judges is far-reaching. They render final decisions in individual cases (in contrast to the recommended outcomes subject to approval by an agency head that is issued by administrative judges),[6] and their factual findings receive deference on appeal unless their decisions are determined to be clearly erroneous.[7]

Intersection with Other Legal Fields

In ever-increasing ways, immigration law is permeating all aspects of the legal arena. Legal practitioners who do not specialize in immigration law readily recognize how immigration law overlaps with criminal law. However, the profound impact a noncitizen's legal status may have in family, juvenile, and civil courts remains largely unknown.

The Immigration and Nationality Act (INA) contains separate provisions that prohibit an individual from entering the United States (sometimes despite an otherwise valid visa) and cause an individual who has already been admitted into the United States to become removable.[8] With few exceptions, every time a noncitizen seeks to enter the United States from a trip abroad, he or she is subject to the grounds of inadmissibility, which also apply to individuals in the United States who are seeking to obtain lawful status, because, in this case, it is a statutory prerequisite that the applicant not be inadmissible.[9] Even immigrants who are already in the United States and hold legal status may become removable by violating a condition of their immigrant or nonimmigrant status or by committing an act or crime that is grounds for removal.[10]

The interplay among these complicated and at times contradictory provisions relating to inadmissibility and removability creates fertile ground for confusion, even for experienced practitioners of immigration law. Another problem is the fact that noncitizens who are inadmissible or removable on account of criminal convictions (as well as some violations of civil protective orders)[11] are often barred from satisfying statutory eligibility requirements for various

forms of affirmative immigration benefits and relief from removal. One of the ways this problem may arise is because the INA provides that many convictions—and some conduct—bar applicants from demonstrating the good moral character required for most forms of relief.[12]

Placed in this context, it is easy to see how unintended consequences can flow from criminal convictions as a result of the complex interplay of various provisions of the act. When one factors into the mix the diversity of statutory language in federal and state criminal codes as well as the variety of prerequisites and obligations imposed by federal and state sentencing dispositions, it becomes quite clear how the application of the INA in individual cases sometimes results in distortions and disparate outcomes at the immigration-court level and why a basic understanding of immigration law is now a staple in criminal courts.[13] Particularly in cases in which the impact of a criminal disposition is not thoroughly considered in advance, the risk of unintended consequences to an individual's immigration status is extremely high in this ever-changing area of law.

The importance of the intersection between immigration law and criminal law recently reached an all-time high with the U.S. Supreme Court's decision in *Padilla v. Kentucky*, in which the Court found that, "as a matter of federal law, *deportation is an integral part—indeed, sometimes the most important part—of the penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes."[14] The majority opinion rejected the state court's finding that erroneous advice about immigration consequences is merely "collateral" and thus not covered by the Sixth Amendment's guarantee of effective assistance of counsel.[15] Ultimately, the Court held that the incorrect advice Padilla had received from his criminal attorney was constitutionally deficient, and the case was remanded to determine if prejudice resulted from the ineffective assistance of Padilla's counsel.[16]

Even though the possible significant impact of criminal proceedings on an individual's immigration status is increasingly on attorneys' legal issue-spotting radars, how immigration law intersects with family, juvenile, and civil cases may be less obvious to those who are unfamiliar with the reach of our immigration statutes. These intersections are equally crucial, however: it is estimated that more than four million children who are U.S. citizens live in families whose members' immigration status is mixed.[17] Even more sobering is the fact that, in the first six months of 2011, more than 46,000 parents of U.S. citizen children were removed from the United States, resulting in the placement of an estimated 5,000 or more children in foster care because of their parents' detention or deportation on account of their immigration status.[18]

With these statistics as context, a working understanding of immigration law becomes all the more important for the attorney whose practice includes family or juvenile law. For example, attorneys who are not involved in immigration law often do not know that a child must be under the age of 16 at the time an adoption is completed in order to obtain an immigration benefit from that adoption.[19] In addition, immigrant minors who are abused, abandoned, or neglected by a parent may be eligible for legal status as "special immigrant juveniles" under the INA.[20] Undocumented victims of domestic violence—juveniles as well as adults—may be eligible for immigration benefits that result in legal status.[21] Another little known fact is that a civil or criminal finding of a violation of a domestic violence protection order is a basis for removal, as are adult convictions for child abuse or domestic violence.[22]

A noncitizen's immigration status may also be implicated in civil court proceedings in which the legal status of a plaintiff, defendant, or witness comes into play or violations of state labor laws are raised. For example, issues related to an immigrant's mental or physical disability raised in state court can create complications in terms of a person's competence to stand trial, and some communicable diseases can jeopardize a person's immigration status.[23] State laws may limit civil damages for undocumented noncitizens, and their immigration status may complicate their tenant and housing status.[24]

In short, these examples illustrate just a few of the myriad ways in which immigration law is permeating virtually all legal fields with increasing frequency.

Current Challenges Facing the Immigration Court

In the midst of the increasing impact immigration judges' daily workload has outside their court proceedings, these judges must also address this complex area of law at an accelerated pace and with diminishing resources. For years now, the system has been struggling to accommodate the evolving demands of circuit court precedent, which requires more in-depth rationales for decisions that are made. At the same time, immigration judges face increased pressure to complete more cases at a faster pace and without sufficient law clerks or the necessary time off the bench to conduct research and draft decisions. To put their plight in context, it should first be noted that the average district judge has a pending caseload of 400 cases and three law clerks to assist him or her, whereas, in FY2010, each immigration judge completed an average of more than 1,500 cases, with the assistance of one law clerk shared with four judges at that time.[25] By the end of September 2011, the number of cases pending before the immigration courts reached an all-time high of more than 297,551—a 60 percent increase since the end of FY2008.[26] In the first 10 months of FY2011, cases remained pending 30 percent longer than the average disposition time in FY2009.[27] Under these circumstances, it is not surprising that recent studies have found that immigration judges suffer from greater stress and burnout than prison wardens or doctors in busy hospitals.[28]

Despite the complexity of the task facing immigration judges, the resources allocated to the immigration courts have not kept pace with the meteoric rise in the funding received by the Customs and Border Patrol and by Immigration and Customs Enforcement (ICE) or the increased focus of the Department of Justice (DOJ) on enforcement of criminal laws related to immigration violations. As ICE's budget rises and provides for better-prepared prosecutions in immigration courts, the private bar and respondents react in kind with more voluminous evidentiary filings and

better-prepared cases. Although this increased professionalism may be good news for the higher courts that review immigration judges' findings, the greater formality of the evidence being proffered by ICE presents a huge challenge for the 57 percent of respondents who are unrepresented and requires a significant amount of additional judicial time to conduct hearings and evaluate such cases.[29] Simply put, immigration judges continue to be inundated as they struggle with chronically inadequate resources.

A Serious Lack of Resources

Examining the recent allocation of resources to the immigration courts highlights a deep flaw in the current system. On Aug. 9, 2006, then-Attorney General Alberto Gonzales proposed 22 specific measures he deemed necessary for the improvement of the quality of immigration courts' performance. More than five years later, there has only been limited success in implementing these measures, and new challenges have arisen to suggest that even these improvements are insufficient to meet today's needs.

An essential element of the attorney general's proposal was his stated intent to seek budget increases in order to hire more judges and judicial law clerks—an acknowledgment that improved performance and service to the public depend on adequate resources. Therefore, it is disappointing to discover that an evaluation of this effort that was conducted two years later showed that eight fewer immigration judges were on the bench than had been employed at the time the attorney general proposed his improvements; a total of 28 positions were left vacant.[30] It was only by December 2010 that 23 of those 28 positions were filled.[31] In addition, the DOJ has repeatedly failed to keep pace with an annual 5 percent attrition rate of immigration judges.[32] Predictions for the near future are dire, as the average age and length of service of our current corps foreshadow an upcoming tsunami of retirements.

Although the pace of hiring has improved somewhat, this slight increase in our ranks has proved insufficient to cope with the waves of new cases buffeting the immigration courts—especially cases involving respondents who have been detained—and more cases are expected to follow. In the first nine months of FY2010, the policies of the current administration and its rapidly expanding Secure Communities Program have resulted in almost a doubling of the rate of removals that have taken place in the past five years.[33] Even though these "removals" include some cases that are not brought before the immigration court, many are, and there has been a concomitant swelling of immigration judges' dockets. The DHS has "prioritiz[ed] criminal aliens for enforcement action," but such "criminal" aliens also include immigrants convicted of traffic violations.[34] In addition, a recent decision made by the Ninth Circuit Court of Appeals has called the procedures for "stipulation orders of voluntary removal" into serious question.[35] As a result, both the DHS and immigration judges are reluctant to use this approach—at least not without first taking significant additional precautions that result in added time to their dockets. The combined effects of these trends result in longer processing times for everyone, including vulnerable populations, such as asylum seekers and juveniles.[36] Moreover, an increasing number of respondents are detained for the duration of their cases—for example, in 2010, the DHS held 363,000 noncitizens in detention in more than 250 facilities across the country.[37]

Another critical resource that should be highlighted in Attorney General Gonzales' 2006 proposal was the call for annual in-person training conferences, which he proposed as another crucial element of his recommended improvement measures and as an acknowledgment of the inferiority of other training mediums. Unfortunately, this proposal has also failed to materialize in any consistent manner. One-half of the annual conferences since 2007 have not been held in person. The Immigration Judge Training Conferences have been cancelled in 2008, 2011, and 2012 and have been once again substituted by a far inferior alternative: CD audio lectures.[38] The cancellation of in-person training conferences neither improves efficiency nor ensures justice, because it deprives immigration judges of sorely needed opportunities to discuss changes in the law interactively and to collaborate with their colleagues.

All these problems—delays in hiring new immigration judges, increased backlogs, significant enhancement of the DHS's enforcement efforts, doubts cast on the legitimacy of stipulated removal orders, and a lack of training for judges—are coalescing to create another "perfect storm": a court system that is incapable of handling its cases in an efficient and competent fashion. Absent immediate steps, this storm will overwhelm the immigration court system and undermine public confidence.

Structural Flaws in the System

Unfortunately, one problem that plagues our system is far more serious than the stress of coping with the unremitting volume and complexity of our caseload or the chronic lack of sufficient resources. The current structure of the immigration court is in constant tension with the legal mandate to immigration judges,[39] who are required by law to "exercise … independent judgment and discretion" when deciding cases and also to take actions consistent with the law and regulations in their decision-making.[40] This legal mandate is consistent with the most fundamental expectation that American society has of any judge: that he or she will exercise independent judgment. Most legal scholars would agree that, without an independent and neutral decision-maker, due process cannot be achieved. The independence of the judiciary in our federal and state court systems is ensured by its separation from the legislative and executive branches.[41] Administrative tribunals, as agencies of the executive branch also provide a valuable method for high-volume adjudications by specialized adjudicators. These tribunals—most of which are governed by the Administrative Procedure Act (APA)—safeguard the independence of decision-making through specific provisions that protect against any commingling of investigative and prosecutorial functions and thereby assure impartiality and independence.[42]

The immigration courts are lamentably unique in that they lack both of these structural protections. They are not

located in the judicial branch of the government, nor are they covered by the APA. Congress long ago accepted the argument that adherence to the statute would be too costly or cumbersome and therefore decided to exempt immigration proceedings from the protections provided by the APA.[43]

The immigration court system is part of the executive branch of government and is located in an agency called the Executive Office of Immigration Review (EOIR)[44] within the DOJ. Until the last decade, the DOJ also housed the Immigration and Naturalization Service (INS), the same office that employed the prosecutors appearing before the immigration court; now those prosecutors are housed in another executive branch agency, the DHS.[45] As employees of the executive branch rather than the judicial branch, immigration judges are viewed by the DOJ as "attorneys" who are employed by the U.S. government, rather than true judges—a status that is in constant tension with the role immigration judges actually fulfill.[46]

The dilemmas created by this problematic structure abound. As DOJ attorneys, we are governed by the ethical rules applicable to government attorneys, not solely by judicial canons. The conflict becomes far more than theoretical when one realizes that this means we have a "client"—the U.S. government—that is the same client represented by the DHS prosecutors who appear in our courtrooms. Viewed from this standpoint, the current structure far too closely parallels the structure that existed before the creation of the DHS, when the attorney general served as the boss of both the prosecutors and the immigration judges. This relationship clouds the issue of ex parte communications to the point of rendering the concept virtually obliterated, legally speaking. After all, immigration judges and DHS attorneys are just part of one big family of attorneys working for the U.S. government, right?

Immigration judges are also affected on a day-to-day basis by a conflict that results from the court being "housed" within the DOJ, an agency that is closely aligned with the DHS and shares its primary mission of law enforcement rather than objective adjudication.[47] Many of the effects of this conflict are simply perceived but some are real.

Unfortunately, the history of the immigration court system is rife with instances during which law enforcement placed undue pressure on immigration judges. Indeed, immigration judges are all too familiar with the old chestnut about a Texas immigration judge who lost his parking space because the district director of the INS was upset with the judge's decision in a case.[48] Even though this rumor may seem laughable, the discomfort felt by the judges who were at the mercy of the INS for worksite conditions was all too real and contributed to a desire not to "rock the boat." A similar discomfort persists today, because many immigration courts remain located inside detention centers that are operated or controlled by the DHS, and many other courts are located in the same building that houses DHS offices and prosecutors.

In addition, there is the day-to-day problem of the public's perception of immigration courts being housed in the same building as the prosecutor and using some of the same resources. The public and even members of the press all too frequently refer to the "INS courts" and are unaware that immigration courts are now part of the DOJ—a department that is completely separate from the former INS, now replaced by DHS. In addition, many of the respondents appearing before the immigration courts come from countries "where a courtroom is not an institution of justice, but rather an extension of a corrupt state."[49] It is not infrequent in immigration court for an unrepresented respondent to assume that the immigration judge works for the same entity as the DHS prosecutor does. It is difficult to elicit cooperation and forthrightness from individuals who believe that the deck is stacked against them from the very start of legal proceedings. These perceptions are even more difficult to dispel when the judge's courtroom is located directly across the hall from the prosecutors' office. This problem is exacerbated when the court is located in a detention center, where the guard providing security for the courtroom may be the same guard who is watching over the respondent in his "barracks."

It is not just the physical co-location of immigration courts with the prosecutor's office that has led to charges that immigration judges are subject to undue pressure from the government. Recently, a report from the Chicago Appleseed Fund for Justice noted the following: "The Immigration Courts and the BIA [Board of Immigration Appeals] [have] never enjoyed a stellar reputation for impartiality. But that reputation fell to a new low after a deliberate effort to stack the Immigration Courts … in favor of the government between 2004 and 2006."[50] The report also claimed that the composition of the immigration courts favors the government in that "almost 80 percent of Immigration Judges have professional backgrounds that tend to cause them to find in favor of the government significantly more often than judges without these backgrounds."[51]

This public perception of the Immigration Court affects immigration judges' ability to do their jobs. As noted above, an immigration judge is expected to use his or her independent judgment and to be impartial. The Appleseed report reminded the profession that "John Adams urged that judges should be 'impartial and independent as the lot of humanity will admit.'"[52] The public's skepticism regarding immigration judges' independence and impartiality makes it extremely difficult, if not impossible at times, to establish the trust and cooperation necessary to obtain all the relevant evidence that is essential for making determinations that are fair.

Yet these are not the only problems created by our current structural position. As attorney employees, we are also subject to performance evaluations and metrics, which include whether or not we contribute to achieving the DOJ's mission by successfully prioritizing "case completion goals." It is axiomatic that "justice delayed is justice denied," litigants should expect to have their cases heard fairly and promptly. In federal, state, and local courts, judges struggle to keep up with burgeoning caseloads. The same is true in immigration court, but, because it is located within a federal agency, there are mechanisms in place that are outside the control of the litigants and that impose constraints

on immigration judges' schedules—that is, case completion goals. In the immigration court system, these goals have become an undue and sometimes unseen pressure on an immigration judge's ability to render a thorough, well-reasoned decision.

In June 2000, the Executive Office of Immigration Review (EOIR) began formulating case completion goals, which were formally implemented in May 2002.[53] The goals were the result of requirements imposed by the Government Performance and Results Act of 1993. Bound by its mandate, the DOJ had to provide some measure to quantify achievements and ensure accountability; therefore it chose to establish "adjudication priorities" for the immigration courts and elected to measure success by evaluating whether or not each court met its case completion goals.[54]

Because the stated purpose of these goals is to assist the immigration courts in "adjudicat[ing] cases fairly and in a timely manner,"[55] the Executive Office of Immigration Review established a time frame for the completion of every case, based on the case type, and set expectations for the percentage of cases to be completed within that time frame.[56] In an effort to provide some flexibility, the EOIR determined that, for the most part, completing 90 percent of cases within the established time frame was an "acceptable long-term result."[57] The agency monitors each local immigration court to identify any that have not completed their cases within the established time frames and takes action to assist the courts that are not meeting the goals.[58] Extremely problematic is the fact that litigants might not be aware of these goals or the pressures they place on immigration judges, because these goals are internal management directives that are not "on the record" with regard to how they apply to a particular case. The DOJ has made it clear that these goals are essential to compliance with the Government Performance and Results Act and consistently justifies measuring these goals by asserting that they are set for the court as a whole, not just for individual judges. The perception of individual judges and the pressures these goals place on them is not so clear. Ultimately, the question should be: Does this tension even need to exist or could structural reforms eliminate the conflict once and for all?

Perhaps the most telling fact is that our current structure has resulted in immigration judges' dramatic lack of authority in controlling their own courtrooms. Despite a congressional mandate in a statute passed more than 15 years ago, immigration judges today continue to operate without the implementing regulations that would allow them to employ their authority to charge individuals with contempt of court. "With the mountain of cases facing Immigration Judges every day, judges need to run their courtrooms as efficiently as possible; this necessarily requires the power to discipline all attorneys who come to court unprepared."[59] Even though immigration judges have had the authority to sanction attorneys by imposing civil monetary penalties since 1996,[60] the DOJ has failed to promulgate the regulations needed to implement this authority. This lack of an appropriate mechanism for sanctioning attorneys appearing before the court has created additional pressures that may contribute to stress and intemperate behavior on the part of immigration judges.[61]

The current procedures for sanctioning "practitioners" appearing before the immigration court are one-sided. Only an attorney "who does not represent the federal government" may be sanctioned for "criminal, unethical, or unprofessional conduct."[62] Because this procedure can be used only against a private attorney, some immigration judges are reticent to use it, believing it may create the appearance of a lack of impartiality. Yet, without the ability to impose sanctions, an immigration judge lacks a vital tool to address misconduct on the part of an attorneys. This situation leaves immigration judges without a mechanism to punish recalcitrant government lawyers, short of resorting to punitive rulings that may benefit a respondent who may not deserve it, rather than punish the true culprit: the government attorney. One obvious consequence of such an outcome is highly problematic: the perception of favoritism can persist because it may seem as though government attorneys who escape deserved discipline are receiving preferential treatment.

Solutions to Problems Caused by Flaws in the System

The best solution to these and other problems caused by this structural flaw is the creation of an Article I immigration court or, as an alternative, the establishment of an immigration court in an independent agency outside the DOJ.[63] We recommend an Article I tribunal consisting of a trial-level immigration court and an appellate-level immigration review court. An aggrieved party should have resort to the regional federal circuit courts of appeal following the conclusion of those proceedings. This model is based on the U.S. Tax Court, which also provides for initial adjudication in an Article I tribunal with limited jurisdiction followed by review in an Article III court of general jurisdiction, which is a regional circuit court of appeal. Appointments of immigration judges, their terms of office, salary, retirement plans and requirements, and disciplinary action should also be patterned after the tax court example.

This approach addresses not only concerns that deportation decisions benefit from adjudicators who have developed expertise in the area, but also the need for impartial review. Full appellate review should be available from the Article I court's decision in the federal courts of appeal. Implementation of this proposal would satisfy the need for independence in the area of adjudicative review while retaining the efficiency of a specialized tribunal. To maintain continuity, sitting immigration judges would be grandfathered for their respective terms of office.

The immigration courts and the Board of Immigration Appeals have evolved into tribunals that resemble Article I or Article III courts more closely than administrative agencies do. Traditionally, unlike courts that address specific cases and controversies, administrative agencies adjudicate prospectively, announcing rules to be followed based on congressionally enacted legislation. Administrative agencies do not punish for contempt, one of the inherent powers of a court and a power recognized by Congress as an appropriate tool for immigration judges. Administrative adjudicators rarely render final decisions that are binding

on their agencies, as opposed to immigration judges, who do so in virtually 90 percent of their cases.

The removal of the immigration review functions from the DOJ and the establishment of an independent and insulated Article I court for trial-level and administrative appeals would create a forum that has the needed checks and balances to ensure due process. The DOJ would be free to focus all its efforts on its primary mission, the prosecution of terrorists and other law enforcement activities, an increasingly compelling focus. Both due process and judicial economy would be fostered by a structure where the immigration court's status as a neutral arbiter is enhanced. The court's credibility would be strengthened by a separate identity, one clearly outside the imposing shadow of the DHS or the law enforcement priorities of the DOJ. The court would continue its impartial scrutiny of allegations made by the DHS, endorsing those determinations that are correct and providing vindication to those who are accused without sufficient objective proof. In addition, the immigration court would no longer be compelled to apologize to the public for its close alignment with the prosecutors.

The establishment of an immigration court that is not an administrative agency but still resides in the executive branch would aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the mandate of immigration adjudication is being carried out in a fair, impartial, and efficient manner and would also allow an independent funding request to Congress so as to assure that the court's budget is not shortchanged. In addition, such a structure would provide a needed safeguard against possible prosecutorial excesses and would protect the trial and appellate-level immigration tribunals from the consequences of the blurred lines of authority between the DHS and the DOJ.

This idea is far from novel; it has been seriously considered for 30 years.[64] The merits of this solution have been endorsed recently by comprehensive studies commissioned by the American Bar Association and the Chicago Appleseed Fund for Justice.[65] The National Association of Women Judges and American Judicature Society have endorsed the concept as well.[66]

History has shown that incremental modifications to the immigration courts have not resolved the pernicious problems discussed here. After years of thorough study, a bipartisan select commission concluded this was the proper solution in 1981. Now, some 30 years later, after an exhaustive study by all stakeholders, the American Bar Association—the nation's largest bar association—has again come to the same conclusion.

We appreciate many of the efforts that the Department of Justice has made, and continues to make, to provide for fair and full adjudications before the immigration court system. Nevertheless, it is only through an Article I court or a separate agency that complete independence and impartiality can be achieved—both in reality and in the public's perception.

Just a Fairy Tale?

Thus, while we immigration judges toil at the mundane chores, ofttimes feeling unloved and unappreciated, I often think of Cinderella. With hard work, a loving heart, good friends (many in unexpected forms and places), and a hefty dose of magic, her life was transformed into the one we all knew she deserved. I know the solution to the problems plaguing the immigration court system is no glass slipper, although some days it seems just as elusive as finding that perfect fit. Readers should be aware that, even after 35 years of scrubbing floors and plenty of disappointments, I still believe in fairy-tale endings and so should you. **TFL**

Hon. Dana Leigh Marks has been an immigration judge in San Francisco since 1987. She is currently serving her fifth two-year term as president of the National Association of Immigration Judges. Prior to taking the bench, she was lead counsel for the DOJ in the landmark case of INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which she orally argued before the U.S. Supreme Court, and which established that asylum applicants need only prove a reasonable possibility of future persecution, instead of the higher clear probability standard advocated by the U.S. Department of Justice. The opinions expressed in this article do not purport to represent the views of the DOJ, the Executive Office for Immigration Review, or the Office of the Chief Immigration Judge. Rather, they represent the formal position of NAIJ and the personal opinions of the author, which were formed after extensive consultation with her constituency.* *© 2012 Dana Leigh Marks. All rights reserved.*

Endnotes

[1]In December 2010, the Executive Office for Immigration Review (EOIR) announced that the number of immigration judges had reached 270. EOIR, News Release, *The Executive Office for Immigration Review Swears in Nine Judges, Judge Corps Reaches 270 Serving in 59 Courts* (Dec. 20, 2010), available at www.justice.gov/eoir/press/2010/IJInvestiture12172010.pdf. However, it should be noted that, at present, 13 members of the corps serve as managers and supervisors either full time or for the majority of their time. In addition, since that announcement was made, several immigration judges have retired or left EOIR. Although a handful of new judges have been named since the announcement, DOJ has now imposed a hiring freeze. Hence, the actual number of full-time immigration judges is approximately 260, virtually the same number that former Attorney General Alberto Gonzales said should have been immediately in place more than five years ago.

[2]*Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). These cases have also been analogized to criminal trials, because fundamental human rights are so inextricably tied to these enforcement-type proceedings. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 276 (1992).